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No. 83-1611

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PETER WALTON,
Appellant,

vs.

ALASKA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

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I

INTRODUCTION

Peter Walton has appealed to this Court from a decision of the Alaska Supreme Court suspending him from the practice of law for a period of 18 months. *Disciplinary Matter Involving Walton,* 676 P.2d 1078 (Alaska 1984). Walton seeks review of that decision on two grounds. First, he claims that the Alaska Bar Rules, which provide that disputed issues of fact in attorney disciplinary proceedings be resolved by a preponderance of evidence standard, denied him Due Process of Law under the Fourteenth Amendment of the United States Constitution. Second, Walton claims that since the standard of proof for judicial disciplinary

proceedings in Alaska is "clear and convincing" evidence, that standard must also be used in attorney discipline proceedings. In Walton's view, use of a preponderance of the evidence standard in the disciplinary proceedings against him violated his right to equal protection of the laws.

Walton's appeal should be dismissed, or alternatively the decision of the Alaska Supreme Court should be summarily affirmed. The procedural rights under Alaska's attorney disciplinary rules are more than adequate to safeguard the federally protected interests of attorneys charged with professional misconduct. Due process of law does not, as Walton claims, require "clear and convincing" proof for attorney discipline. Walton's equal protection claim was not adequately presented to the Alaska Supreme Court. As a result, the Alaska Court did not pass upon or even address this issue. Accordingly, it may not be raised for the first time on appeal to this Court. Moreover, since judicial disciplinary proceedings involve interests that are substantially different in nature and weight from those at issue in attorney discipline cases, the application of a higher standard of proof for judges does not deny attorneys equal protection of the laws.

II

PROCEEDINGS BELOW

The facts which gave rise to this disciplinary proceeding are described in detail in the Alaska Supreme Court decision. 676 P.2d at 1079-81. We will briefly summarize those facts here. On March 2, 1973, William Childs, then an employee of the Aleut Corporation, borrowed $13,000 from

the corporation. He signed a promissory note on that date in the amount of $13,000, which provided that the loan was secured by a deed of trust. There was in fact a deed of trust recorded on October 9, 1973, which had been executed on March 2, 1973 from Childs to the corporation, but it was not a first deed of trust. Instead, the recorded document was described in its title as a "second" deed of trust, and the body of the document contained a clause subordinating the rights of the Aleut Corporation to another deed of trust held by the Alaska Mutual Savings Bank. The subordination clause described the deed of trust to the bank, which secured a $47,400 Loan, as having been executed on March 5 and recorded on March 6, 1973. Since the note and deed of trust to the bank had been executed three days *after* the date Childs had signed the original deed of trust in favor of the Aleut Corporation, it was obvious that the deed of trust to the corporation dated March 2 must have been altered after its execution.

Initially, the Aleut Corporation had brought suit against Childs in 1975 to resolve disputes concerning the terms of Childs' employment agreement with the corporation. Peter Walton represented the Aleut Corporation in that litigation. On April 13, 1978, Walton took Childs' deposition, and in the course of the deposition he questioned Childs concerning the $13,000 loan and the deed of trust securing that loan. Childs testified that he had signed the promissory note and deed of trust to the Aleut Corporation on March 2, 1973, and had given copies of those documents to the corporation. He denied that the deed of trust had been altered after he signed it. (Tr. 69) On April 21, 1978, however, at the continuance of his deposition, Childs stated prior to questioning that he wished to change his original testi-

mony; that in fact the deed of trust had been altered and that he knew of that alteration prior to recording the deed. (Childs' Deposition, 4/21/78, at 1.)

On April 14, 1978, one day after Childs' first deposition and seven days *before* Childs admitted the alteration, Walton fabricated a document which he later represented was a copy of an unaltered first deed of trust which Childs had given to the Aleut Corporation. Working from a Xerox copy of the "second" deed of trust that in fact had been recorded, Walton "whited out" the word "second," the subordination clause, the recording data, and the notary seal, and then Xeroxed the document as altered. The result was a Xerox copy of what appeared to be a "first" deed of trust which contained no subordination clause. (Tr. 48-49; Tr. 127; Tr. 186.)

On April 25, 1978, Walton prepared and filed an amended complaint on behalf of the corporation against Childs, alleging that Childs had obtained a $13,000 loan from the corporation some five years previously; that Childs and his wife had executed a first deed of trust on March 2, 1973, and had given a copy of that document to the corporation; that Childs had retained the original of the document; and that he had thereafter altered it prior to recording so that it now appeared to be a "second" deed of trust. (Plfs. Exh. 4.) The complaint contained several allegations concerning the contents of the deed of trust which was originally signed on March 2, 1973. For example, the complaint stated:

> On its face, the original Deed of Trust (*of which a copy is attached marked Exhibit B*) appeared to be a first Deed of Trust, not secondary to any other lien on the subject property. (Emphasis added.)

The complaint further stated that Childs and his wife:

> executed a Deed of trust for the benefit of the plaintiff corporation and delivered a copy thereof to the president and secretary of the plaintiff corporation. *A copy of that copy is attached hereto marked as Exhibit B.* (Emphasis added.)

The document that Walton attached as Exhibit B was a copy of a deed of trust apparently signed by Childs and his wife, but containing no subordination clause, no notary seal, no recording data and no references to "second," in its title. (Plfs. Exh. 4.)

Although the numerous references to Exhibit B in the complaint suggested that it was a copy of an existing document in the corporation's possession, no such document could be found in the corporation's files, and no one then employed by the corporation even remembered the circumstances surrounding the loan itself. (Tr. 174; 176) In fact, the Exhibit B described in and attached to the amended complaint was the deed of trust which had been fabricated by Walton on April 14, 1978. This fabricated "copy" was filed with the superior court and served on opposing counsel. (Plfs. Exh. 4.)

The circumstances of the fabrication of Exhibit B were disclosed to opposing counsel at the deposition of one of the corporation's vice presidents taken approximately one week after the filing of the amended complaint. At that deposition and *before* Walton made his disclosure, a memorandum was produced which had been written by Walton and given to the corporate vice president. That memorandum (to which the fabricated "first" deed of trust was attached) stated:

> Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily

> a copy of his deed of trust on March 2 or he falsely testified when he said it hadn't been altered after executing it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton.

(Plfs. Exh. 6, p. 15.)

Walton did not deny having created Exhibit B. His only contention was that he had not intended for anyone to believe that it was more than simply an "illustration" of what the deed of trust had once looked like, before Childs had allegedly altered it. (Tr. 128.)

The Hearing Committee of the Alaska Bar Association heard testimony from the attorney who had represented William Childs, a law clerk who had worked with Walton preparing the litigation, and from Walton himself. The Committee also had before it the deposition of the corporate vice president who received the "smoking gun" memorandum. On the issue of intent, the Hearing Committee concluded that Walton had in fact intended to deceive when he fabricated the deed of trust. That Committee found:

> Respondent intended that the re-created document attached to the amended complaint as exhibit B would be understood to be a copy of an existing photocopy of a Deed of Trust. This finding is based upon the care exercised by respondent in the preparation of the re-created Deed of Trust, the pleading referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document and Respondent's failure to notify opposing counsel imme-

diately when he became aware that opposing counsel understood the exhibit to be represented as a copy of an existing Deed of Trust.

The Board of Governors of the Alaska Bar Association, sitting as the Disciplinary Board in review of the Hearing Committee's report, also rejected Walton's contention that he created Exhibit B only as an "illustration" of the theory of his case. The Disciplinary Board found additional support for this finding in the text of the "smoking gun" memorandum, and also in the fact that Walton failed promptly to notify either opposing counsel or the superior court that the document was a fabrication. The Disciplinary Board recommended that Walton be suspended from practice for 18 months.

In accordance with Alaska Bar Rule 13(c)(5), the Disciplinary Board forwarded its findings and recommendations to the Alaska Supreme Court. The Alaska Court upheld those findings and rejected all of Walton's due process claims, including the standard of proof claim that he now brings to this Court for review.

III

THE ALASKA SUPREME COURT WAS CORRECT IN HOLDING THAT A PREPONDERANCE OF EVIDENCE STANDARD IN ATTORNEY DISCIPLINE PROCEEDINGS DOES NOT VIOLATE DUE PROCESS

Walton contends that federal due process prohibits Alaska from applying a standard of proof in attorney discipline proceedings less stringent than the "clear and convincing" test. In fact, however, previous decisions of this Court have held only that attorneys are entitled to the basic procedural safeguards in disciplinary proceedings—fair notice of the alleged misconduct and an opportunity to

be heard. *In Re Ruffalo,* 390 U.S. 544, reh. denied, 391 U.S. 961 (1968). Walton has cited no decision from this or any other court holding that federal due process requires any specific standard of proof in attorney disciplinary proceedings, much less a standard of "clear and convincing" proof. Instead, Walton relies on a series of unrelated decisions of this Court requiring an elevated standard of proof for certain limited types of proceedings—proceedings that are vastly different from those at issue here.

We will briefly review those decisions in order to demonstrate first that Walton's reliance on them is totally misplaced and second that attorneys' constitutional rights in attorney disciplinary proceedings are adequately protected by the preponderance of evidence standard.

In *In Re Winship,* 397 U.S. 358 (1970), this Court held that due process mandated proof beyond a reasonable doubt in proceedings where a juvenile was threatened with a finding of delinquency. The Court rejected arguments that delinquency proceedings were essentially "civil" in nature. Noting that a juvenile adjudged to be a delinquent may be "'subjected to the loss of liberty for years,'" the Court found these proceedings to be "'comparable in seriousness to a felony prosecution.'" *Id.,* at 366 (citation omitted). The Court held that the similarity of consequences demanded a similar burden of proof.

The next case to address the standard of proof required under the Due Process Clause was *Addington v. Texas,* 441 U.S. 418 (1979). The issue in *Addington* was whether involuntary commitment for an indefinite term to a mental institution required more than proof by a preponderance

of evidence to satisfy federal due process. Initially, the Court described the analysis for determining the appropriate standard of proof in these terms:

> In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.

Id., at 425.

The Court then concluded that indefinite confinement in a mental institution obviously constituted "a significant deprivation of liberty," to say nothing of the social consequences of that commitment on the individual. On the other hand, the Court recognized that the state had legitimate interests both in providing care to emotionally disturbed citizens and in protecting the community from "the dangerous tendencies of some who are mentally ill." *Id.*, at 426. In striking the balance between these interests, the Court observed that the peculiar nature of mental commitment proceedings (which, in that case, involved resolution of factual disputes by a jury) increased the risk of error in the factfinding process:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a fact-

> finder might decide to commit an individual solely on a few isolated instances of unusual conduct . . . . [or] idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitments will be ordered.

Id., at 427.

Balancing all of these factors, the Court concluded that the individual's interests in commitment proceedings were "of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of evidence." *Id.*, at 427. The Court went on to hold that at a minimum, such proof must be "clear and convincing."

A third case relied on by Walton is *Santosky v. Kramer*, 455 U.S. 745 (1982). At issue in *Santosky* was whether New York was constitutionally prohibited from terminating parental rights on the basis of a preponderance of evidence standard. Once again the Court undertook to weigh and balance three factors—the private interests affected by such a proceeding, the countervailing governmental interests at stake, and finally, the magnitude of the risks and consequences of an erroneous termination of parental rights. In this particular type of proceeding, the Court recognized that there were several separate and distinct "private" interests: those of the parents, those of the child, and those of the foster parents seeking to adopt the child. Turning first to the interests of the natural parents, the Court found their interest "serious" and even "fundamental":

> [A] natural parent's "desire for and right to 'the companionship, care, custody, and management of his

> or her children' " is an interest far more serious than any property right . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that *fundamental liberty interest,* but to end it . . . .
>
> . . . Few forms of state action are both so severe and so irreversible.

Id., at 759 (citations omitted; emphasis added). The Court also concluded that children, like their parents, have an equally "vital interest in preventing erroneous termination of their natural relationship" (*id.,* at 760); and noted the far reaching consequences to the child from the loss of that relationship. *Id.,* at 760, n.11. By contrast, the interests of the foster parents were not directly implicated in the outcome of the proceeding. At worst, the state's failure to prove its case could cause further "delay and uncertainty until their foster child is freed for adoption." On balance, the Court found that this disparity in consequences "strongly favors heightened procedural protections." *Id.,* at 761.

Assessing the risk of error in the proceeding, the Court found that because of the nature of parental rights termination proceedings, there were several factors present in those proceedings that considerably increased the risk of erroneous factfinding. First, the imprecise standards that govern those proceedings were found to be "unusually open to the subjective values of the judge." *Id.,* at 762. Further, because parents faced with termination proceedings are "often poor, uneducated, or members of minority groups," the Court found that these proceedings were "often vulnerable to judgments based on cultural or class bias." *Id.,* at 763. The risk of error in this particular type of case was

further magnified by the fact that the "state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." *Id.* The Court found that "[c]oupled with a 'preponderance of evidence' standard, these factors create a significant prospect of erroneous termination." *Id.*, at 764. In light of the severity of the consequences to the parent of an erroneous termination in contrast to the "uneasy status quo" that results from a failure by the state to prove its case, the Court found that a preponderance of the evidence standard, which allocates the risk of error nearly equally between the parties, did not properly reflect the vast disparity in the consequences.

Even the government's interests in cases involving parental rights—preserving and promoting the welfare of the child and reducing the costs of termination proceedings—were found to be consistent with a stricter standard of proof than preponderance of evidence. A stricter standard would not appreciably increase the costs or burdens to the state. At the same time, since the state had *no* interest in separating children from *fit* parents, it was as much in the state's interests as in the parents' interests to promote accuracy in the determination of whether the parents were capable and willing to provide a normal home. The Court, accordingly, held that the "logical conclusion of this balancing process is that the 'fair preponderance of the evidence' standard . . . violates the Due Process Clause of the Fourteenth Amendment," and further that "a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." *Id.*, at 769.

Addington and *Santosky* are significant in that they represent the *only two instances* where this Court has invalidated on *constitutional* grounds a state's choice of the standard of proof to be applied in proceedings that are undeniably "civil" in nature.[1] The factors, however, which were paramount to the *constitutional* issues in those cases—the fundamental individual liberty interests and the significant risks of error inherent in mental commitment and parental termination proceedings—are simply not present in this case.

The interests of an individual attorney in a professional disciplinary proceeding are twofold. First, a suspension or termination of an attorney's license to practice law interferes with his or her livelihood and is likely to engender financial loss. Second, a finding of misconduct sufficient to warrant public sanctions may affect the attorney's reputation. These are undoubtedly serious interests, which is why this Court has held that they are entitled to basic due process protections of notice and hearing. It is quite another matter, however, to suggest, as does appellant, that interference with or deprivation of these interests is comparable to involuntary confinement in a state mental institution or to permanent termination of the parent-child relationship. Unlike a commitment proceeding, suspension of a profes-

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[1]In *Woodby v. INS*, 385 U.S. 276 (1966), and in *Schneiderman v. United States*, 320 U.S. 118 (1943), this Court adopted a clear and convincing standard for deportation proceedings and for denaturalization proceedings. In both cases the federal statutes governing those proceedings were silent as to the burden of proof to be applied. Neither of those cases, however, purported to involve constitutional rulings. And *Winship*, of course, involved proceedings that were not "civil"at all, despite the "civil" label traditionally applied to juvenile delinquency proceedings.

sional license in no way affects one's fundamental right to freedom of movement, nor does an attorney's interest in reputation or pursuit of a profession rise to the 'fundamental liberty interest" of parents to enjoy a natural relationship with their children.[2] Moreover, suspension or revocation of an attorney's license to practice law under Alaska's rules does not inevitably involve a *permanent* loss as does parental termination—a factor that weighed heavily in favor of a higher standard of proof in *Santosky*. An attorney under suspension may, under the Alaska Bar Rules, apply for reinstatement at any time; even a disbarred attorney may make such an application after five years. Significantly, the burden of proof imposed upon the suspended or disbarred attorney to show his or her fitness to resume the practice of law[3] is the same standard required for disciplinary action—proof by a preponderance of evidence.

The Alaska Supreme Court, in assessing the private interests at stake in attorney discipline proceedings found those interests to be "weighty." However, due process does not necessarily require clear and convincing proof simply because the proceedings affect "weighty" individual interests. As the Alaska Court correctly noted, a balance must be struck between the individual interests and other considera-

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[2]Indeed, one's interest in reputation alone is not even cognizable under the federal Constitution. *Paul v. Davis*, 424 U.S. 693 (1976).

[3]Specifically, Rule 27 of the Alaska Bar Rules requires an applicant for reinstatement to demonstrate "that he has the moral qualifications, competency and learning of law required for admission to practice law in this state and that his resumption of the practice of law . . . will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest."

tions—specifically the governmental interests in the proceeding and the likelihood that a preponderance of the evidence standard will create a significant risk of error in the factfinding process.

In *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), this Court recognized that the state's interests in the professional conduct of attorneys are "particularly strong." The Court described the nature of those interests in this way:

> In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. . . . "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.' " . . . While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

Id., at 460 (citations omitted).

The state has an obvious and significant interest in the fair and effective administration of justice; that interest, in turn, requires a high degree of confidence on the part of courts, clients, and attorneys that the rules of conduct prescribed under the Canons of Professional Responsibility will be honored. A preponderance of evidence standard in attorney discipline matters promotes public confidence in the high ethical conduct of attorneys. Judges and opposing counsel working in the justice system constantly rely on representations by attorneys. That reliance may well be

eroded if attorneys may continue to practice law undisciplined where the demonstration of their ethical misconduct may not be "clear and convincing," but still shows that the unethical acts "more likely than not" took place.

The potential harm to the administration of justice from unethical attorneys is extremely serious; the potential harm to individual clients is enormous. Given the increasing complexity of legal problems in our society, clients must be willing to place their total trust in their attorneys to protect not just their financial interests, but a host of fundamental liberty interests ranging from marriage and child custody in civil cases to personal freedom in criminal cases. That trust, of necessity, will be limited if clients know that even attorneys who "more likely than not" engage in unethical conduct still are licensed by the state to advise them.

Moreover, there is no reason to believe, as there was in *Addington* and *Santosky,* that the preponderance of evidence standard in attorney discipline cases creates an undue risk of error in the factfinding process. For one thing, unlike the rules of conduct at issue in mental commitment and parental rights termination proceedings, the rules of conduct for attorneys are clear. Indeed, knowledge of the Canons of Professional Responsibility is a condition of being admitted to practice in the first instance. Because the rules are clearly understood, there is little danger that, as in *Santosky,* the subjective values of the factfinders will play a role in the factfinding process. Nor are cultural or class biases likely to affect the factual determination. The Hearing Committees under Alaska Bar Rule 15(b) are composed of both attorneys and nonattorneys—a composition that

serves to bring special expertise to the factfinding panel while at the same time reducing the risk that individual values may undermine the accuracy of the factfinding process. Nor can there be any serious concern that the Bar Association's ability to pursue a discipinary action or its access to the facts is any greater than the attorney's access to those facts or his ability to mount a defense.

Given these factors, there is small likelihood of error in the factfinding process. Consequently, a clear and convincing standard of proof will have little impact on the reduction of what is already an insignficant risk of error.[4] When that minimal risk of error is balanced with the relative equality of the interests of the individual and the state, it is clear that the Alaska Supreme Court correctly concluded that a standard of proof which allocates the risk of error more or

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[4]The full panoply of procedural safeguards afforded to attorneys under the Alaska Bar Rules contributes as well to minimizing those risks even further. For example, if an attorney facing formal disciplinary action believes he cannot obtain a fair and impartial hearing before any member of the Hearing Committee, the attorney is entitled to peremptorily challenge that member by filing an affidavit alleging that belief. Rule 15(d). Charges of misconduct must be in writing, must set forth "with specificity the charge of misconduct," and must be personally served on the attorney. Rule 15(e). At the hearing the attorney is entitled to be represented by counsel, to examine and cross-examine witnesses, to have subpoenas issued in his behalf. Rule 15(f). If the attorney cannot afford counsel, he may request that counsel be appointed for him at the Alaska Bar Association's expense. Rule 22. The findings of the Hearing Committee are reviewed by the Board of Governors of the Alaska Bar Association, sitting as the Disciplinary Board. And if that Board recommends that the attorney be disbarred, suspended or publicly censured, the Disciplinary Board's findings and recommendations must be reviewed further by the Alaska Supreme Court. Rule 13(c)(5).

less equally between the parties does not violate federal due process.

Even when important individual interests are involved, this Court has approved the application of the preponderance of evidence standard so long as *fundamental* liberties such as those in *Addington* and *Santosky* are not at stake. For instance, in *Vance v. Terrazas,* 444 U.S. 252 (1980), this Court rejected the argument that due process under the Fifth Amendment was violated by the application of a preponderance of evidence standard in expatriation proceedings initiated by the State Department. The Court reached this conclusion despite the fact that in previous cases it had recognized and even "stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation." *Id.*, at 266. Similarly, in *Steadman v. SEC,* 450 U.S. 91, reh. denied, 451 U.S. 933 (1981), the Court held that Congress had intended that the preponderance of evidence standard generally applicable under the Administrative Procedures Act should apply in disciplinary proceedings against securities brokers under the antifraud provisions of the federal securities laws. The Court affirmed the suspension of a broker's license for violating those provisions, and observed that in adopting a preponderance of evidence standard:

> Congress was free to make that choice, Vance v. Terrazas, 444 U.S., at 265-66, and *in the absence of countervailing constitutional restraints,* the courts are not free to disturb it.

Id., at 104 (emphasis added).

The interests at stake in attorney discipline cases are no more substantial than those of a person facing expatriation,

and are virtually identical to the interests of the disciplined broker in *Steadman*.[5] Walton has failed to demonstrate that the application of the preponderance of evidence standard in state proceedings to discipline attorneys raises a substantial federal question.

IV

WALTON'S EQUAL PROTECTION CLAIM MUST BE DISMISSED BECAUSE HE FAILED TO ADEQUATELY RAISE THE CLAIM BEFORE THE ALASKA SUPREME COURT AND BECAUSE THE CLAIM IS TOTALLY WITHOUT MERIT

Walton has also asked this Court to rule that the preponderance of evidence standard applicable to attorney discipline proceedings in Alaska violates equal protection of the laws because while Alaska uses a preponderance of evidence standard for attorney discipline proceedings, judicial disciplinary proceedings are governed by the clear and convincing standard of proof.[6] Like his due process claim,

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[5]Walton's subsidiary contention that due process at a minimum requires that allegations of fraud be proved by clear and convincing evidence has absolutely no support in the decisions of this or any other court. While this Court noted in *Addington* that "some jurisdictions" use the clear and convincing standard in civil cases involving fraud, the use of that elevated standard in civil fraud cases is by no means universal. In fact, in Alaska, preponderance of evidence is the standard in those cases. *Saxton v. Harris*, 395 P.2d (Alaska 1964). But in any event, none of the cases cited by Walton involved a constitutional ruling mandating the higher standard.

[6]The basis for Walton's claim is the decision of *In Re Hanson*, 532 P.2d 303 (Alaska 1975)—the first case in Alaska to involve the question of the standard of proof in judicial disciplinary proceedings. Since neither statute nor rule specified the standard of proof for such proceedings, it was necessary for the court to supply one. Citing the serious nature of proceedings which may deprive an individual of a public office, the court adopted the clear and convincing standard for judicial discipline.

Walton's equal protection claim fails to raise a substantial federal question. Moreover, the claim is subject to dismissal because it was not adequately raised before the Alaska Supreme Court.

This Court has consistently held that it is without jurisdiction to consider federal claims that were not properly raised or passed upon in state court proceedings. *Bailey v. Anderson,* 325 U.S. 203, 206-07 (1945); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Webb v. Webb,* 451 U.S. 493 (1981); *Exxon Corporation v. Eagerton,* ..... U.S. ....., 76 L.Ed.2d 497, 504 n. 3 (1983). This doctrine is incorporated in Rule 16.1(b) of the Revised Rules of the Supreme Court of the United States, which provides:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate nonfederal basis.

The record in this case clearly demonstrates that Walton did not adequately raise a federal equal protection claim before the Alaska Supreme Court. This failure is evident both from the absence of any mention of equal protection in either the majority or dissenting opinions of the Alaska Supreme Court in this case, as well as from a review of the cursory manner in which Walton dealt with the issue in his written arguments to that court.

Neither the majority nor the dissenting opinion even mentions, let alone passes upon, the issue of whether an attorney disciplined under a different standard of proof than that applied in judicial disciplinary proceedings is

denied equal protection under the United States Constitution. This Court in *Webb v. Webb* discussed this precise situation and commented:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969); see also Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Chambers v. Mississippi, 410 U.S. 284, 290, n. 3 (1973); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

451 U.S. at 495.

It is clear from the record that the reason the Alaska Court did not address an alleged federal equal protection violation in this case was because Walton did not adequately raise that claim. The only mention of "equal protection" anywhere in the voluminous written briefs that Walton presented to the Alaska Supreme Court is found in the following paragraph of his opening brief:

> In *Hanson,* this Court cited the Supreme Court of Texas in the matter of *In Re Laughlin:*
>
> > "The serious nature of the proceeding depriving one of a public office . . . ought at the very least to require proof by clear and convincing evidence." 265 S.W.2d at 809.
>
> The same argument can be made with regards to attorneys. The same quantum of evidence should apply to judges and lawyers as the same basic issues are involved. To do any less denies attorneys the equal protection of the law.

(Appellant's Br. at 50.)

There was no citation to the federal Equal Protection Clause of the Fourteenth Amendment, no citation to any

relevant federal authority, no argument of the issue, and no further mention of equal protection anywhere else in the opening brief. Not surprisingly, the brief presented on behalf of the Alaska Bar Association contained no discussion of equal protection. This omission was not noted in Walton's reply brief; indeed, that brief contained no mention of equal protection whatsoever.

Moreover, after the Alaska Supreme Court had decided the case, Walton sought rehearing. He made no reference in his petition to the fact that the court's opinion failed to address equal protection. Walton's only reference in that pleading to the standard of proof for *judicial* discipline was to question whether it was appropriate for "a two justice and one superior court judge majority to attempt to overrule *In Re Hanson*, 532 P.2d 30 (1975) . . .".[7] In a separate motion, Walton urged that his petition for rehearing be heard by the "five duly appointed justices of the Supreme Court of Alaska." After noting the majority's suggestion that the court may be required to reevaluate the clear and convincing standard of proof adopted in *Hanson* in an appropriate case in the future, Walton went on to observe, "Under the majority's opinion, there presently exists a different standard for judges than for lawyers.

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[7]Walton had argued in support of his due process claim that the individual interests in attorney discipline proceedings were the same as those involved in judicial discipline proceedings. Addressing this argument, the majority opinion noted:

> In light of today's ruling we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings aaginst a judge.

676 P.2d at 1085, n. 11.

As is argued in Respondent's Brief, this phenomenon is definitionally a denial of the equal protection of the law." Once again there was no citation of authority nor any indication that Walton had expected the Alaska Court actually to rule on an equal protection claim.

These two cursory references to "equal protection" in Walton's opening brief and in the motion accompanying his petition for rehearing were not sufficient under state law to have raised that issue before the Alaska Supreme Court. That court has consistently held that under Alaska Appellate Rule 212, it will not consider or rule on an issue where the issue is given no more than cursory treatment in the argument portion of the brief. *See, e.g., Fairview Development, Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970); *Lewis v. State*, 469 P.2d 689, 691 n.2 (Alaska 1970); *Associated Engineers & Contractors, Inc. v. H. & W. Construction Co.*, 438 P.2d 224, 228 (Alaska 1968). Under Alaska law, Walton's failure to properly present his equal protection argument to the Alaska Supreme Court constituted an abandonment of that claim, requiring no discussion of the claim in the court's opinion.

Quite apart from Walton's failure to present the equal protection issue adequately under state law, it is equally clear that he did not expressly raise a *federal* claim. Where it is not clear from the record that a party was relying on *federal* constitutional provisions rather than on state law or state constitutional provisions, this Court has held that it is without jurisdiction to review the claim. As the Court stated in *Webb:*

> At a minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

451 U.S. at 501 (emphasis in original). Since Alaska's constitution also contains an equal protection provision,[8] there is no way that the Alaska Supreme Court could have known whether Walton's mention of "equal protection" was intended to refer to his rights under the Alaska Constitution or under the federal Constitution. Since this record fails to show that a *federal* claim was even mentioned, let alone adequately presented to the Alaska Supreme Court, Walton's equal protection claim is again subject to dismissal.

Even if Walton *had* presented his equal protection claim adequately, it would be subject to dismissal because it is so without merit that it fails to raise a substantial federal question. Our earlier discussion of the due process factors also addresses the nature of the individual rights and interests that are potentially affected by the application of a preponderance of evidence standard in attorney discipline proceedings. Whatever the importance of those interests, it is clear that they do not involve "fundamental" constitutional rights such as the right to vote or the right to interstate travel which may be infringed or penalized only where necessary to further a compelling state interest. *See, e.g.,*

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[8]Article I, section 1, of the Alaska Constitution provides in part:

> [A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law.

Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel).

In the absence of any infringement of or penalty imposed on a *fundamental* right, a state law or rule that distinguishes between citizens of a state is valid under the Equal Protection Clause of the United States Constitution if it rests "on some ground of difference having a fair and substantial relationship to the object of the legislation." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). In this case, there are obvious and substantial grounds of difference between the potential harm and impact to the respective public and individual interests at stake in judicial and attorney disciplinary proceedings. These differences provide ample justification under the Equal Protection Clause for the application of a more stringent standard of proof for judicial discipline.

The most obvious difference between judicial and attorney disciplinary proceedings lies in the fact that judicial disciplinary proceedings may result in removing a judge from public office. Judicial discipline results in a uniquely high degree of public opprobrium because of the nature of that office. The fact that an attorney has been disciplined may or may not become widely known outside of lawyer and judicial circles. The very nature of judicial office, however, ensures that discipline against a judge will inevitably receive widespread and visible coverage in the media. Beyond this public opprobrium, judicial discipline also threatens loss of salary, position and other emoluments of high public office, none of which are implicated in attorney discipline.

Moreover, the public has a special interest in seeing that its public officials are not lightly removed from office. In Alaska, judges are appointed by the Governor, acting as a representative of the people of the state.[9] A judge's continuance in office must be approved by a majority vote of the electorate in periodic retention elections.[10] Removal of a judge from office in effect nullifies the Governor's initial choice and the choice of the voters who have voted to retain that judge in office. A clear and convincing standard of proof in judicial discipline proceedings serves to protect that important public interest—an interest that does not even come into play in attorney discipline proceedings.

It is equally obvious that misconduct serious enough to warrant judicial discipline is likely to result as well in disciplinary action against the judge's license to practice law. Thus, to the extent that there are similar individual interests at stake in judicial and attorney disciplinary proceedings—primarily interests in reputation and in pursuing a particular profession—those interests are similar only in *nature*. The potential adverse impact on the judge's interests is twice as severe as the impact on the attorney's interests. The attorney may lose his or her license to practice law. The judge may lose that license and a high public office as well.

In *Vance v. Bradley*, 440 U.S. 93 (1979), a statute providing for mandatory retirement at age 60 for Foreign Service personnel was challenged on equal protection grounds. This Court upheld the statute despite the fact that the mandatory retirement age for other federal employees was 70. The

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[9]Alaska Constitution, art. IV, sec. 5.

[10]Alaska Constitution, art. IV, sec. 6.

Court found that a lower retirement age for Foreign Service employees was rationally related to certain government goals that applied only to the Foreign Service—namely, to insure the mental and physical competence of public servants who perform tasks critical to our foreign relations under difficult and demanding conditions in overseas posts. In this case, the clear and convincing standard for judicial discipline is rationally related to legitimate state goals which have no application in the case of attorney discipline. The differences in both the nature of the respective interests of judges and attorneys and in the severity of the consequences of disciplinary action to those respective interests provide a rational basis for applying differing standards of proof. A more stringent standard of proof in judicial discipline does not deny equal protection of the laws to an attorney faced with disciplinary proceedings.

V

CONCLUSION

Walton's claim that use of a preponderance of the evidence standard is a violation of due process does not raise a substantial federal question. The disciplinary proceedings against Walton afforded him every procedural safeguard required under the Due Process Clause of the United States Constitution. Past decisions of this Court require no more than that. There is no reason for this Court to give this claim plenary consideration. It should be dismissed or alternatively, the decision of the Alaska Supreme Court should be summarily affirmed.

It is equally clear that this case does not involve a substantial federal claim under the Equal Protection Clause of the Fourteenth Amendment. This claim, which was not passed on by the Alaska Supreme Court, should be dismissed not only because it fails to raise a substantial federal question, but because it was not adequately raised below.

Respectfully submitted,

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